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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TRACY JAMARE BROWN, Defendant and Appellant.	A102130 (Alameda County Super. Ct. No. 141346A)

Defendant was convicted of first degree murder for the shooting of a drug dealer. Defendant contends that the trial judge erred in excluding the recorded exculpatory statements of a witness who died prior to trial and in admitting evidence of his prior drug-related crimes and expert testimony about drug dealing. We affirm.

I. BACKGROUND

Defendant and a codefendant, David Buchanan, were charged in an information filed August 17, 2001, with murder (Pen. Code, § 187), including the allegations that defendant personally used a handgun and caused great bodily injury in the commission of the offense (Pen. Code, §§ 12022.53, subd. (d), 1203.075) and had a prior narcotics conviction. (Health & Saf. Code, § 11352.)

Defendant and Buchanan often sold rock cocaine near the corner of 28th Avenue and Foothill Boulevard in Oakland. The murder victim, Marlis Cauley, was also a cocaine dealer. Although Cauley had at one time worked from East 16th Street, sometime prior to the murder he relocated to 28th Avenue. Defendant, a longtime

acquaintance of Cauley, acceded to Cauley's selling on 28th Avenue after learning that Cauley had been robbed while dealing at the prior location. According to Buchanan's testimony, however, defendant and Cauley had an ongoing disagreement over Cauley's manner of selling cocaine. Generally, dealers at a common location take turns making sales, but Cauley had a habit of dominating sales by aggressively approaching potential customers, a practice Buchanan referred to as "rushing the knocks [customers]." Buchanan testified that on the evening of the murder, March 26, 2001, defendant had warned Cauley against "rushing the knocks" and threatened vague consequences if Cauley persisted in his aggressive selling practices.

On the night of the murder, Jose Vargas and Michael Perez, two cousins who were frequent customers of all three dealers, walked up 28th Avenue toward Foothill. As the cousins reached the corner, they saw defendant and Buchanan, both of whom approached them. Buchanan greeted Perez, Perez returned the greeting, and Buchanan attempted to initiate a drug transaction.

Almost immediately, Cauley appeared and began to approach the group. When Cauley reached Perez, he put his arm around Perez's shoulders and attempted to steer him from Buchanan and defendant. Seeing his potential customer taken away, Buchanan grabbed Perez in an apparent attempt to take money from Perez's pocket. Cauley then tried to separate Buchanan from Perez, and the three struggled, with Buchanan and Cauley pulling Perez in different directions.

At some point during this commotion, defendant moved closer to the group, raised a gun to Cauley's head, and shot him. Cauley put his hands to his head, screamed in pain, and began jumping up and down. As Cauley did so, defendant fired the gun at least once more.

Cauley died from two gunshots to the back of his head. The pathologist who performed an autopsy on Cauley testified that after the first shot, which penetrated Cauley's scalp but not his skull, Cauley would have retained consciousness and been able to move and speak, but the second wound would have rendered him promptly unconscious.

Testifying in his own defense, defendant admitted to selling cocaine to the cousins on many occasions, but he denied being on 28th Avenue on the evening of the murder and shooting Cauley.

The jury acquitted Buchanan but convicted defendant of first degree murder and found to be true the allegation that he personally discharged a handgun. Defendant was sentenced to a term of 50 years to life in prison.

II. DISCUSSION

A. Evidence Code Section 1240

Defendant first contends that the trial court erred in excluding from evidence the recording of an exculpatory witness interview conducted by the police shortly after the killing. The witness died prior to trial, and the court denied defendant's motion to admit the recording as a spontaneous statement.

The witness was Ophelia Olguin, a 35-year-old woman who approached an investigating officer near the scene and told him that she saw the shooting. Ms. Olguin agreed to accompany the officer to the police station for an interview. Once at the station, the officer concluded that Ms. Olguin was under the influence of heroin because she had difficulty speaking and was visibly "physically uncomfortable." The officer decided to conduct the interview despite her symptoms of intoxication because Ms. Olguin told him she was dying from AIDS. In fact, Ms. Olguin died only one month later.

Ms. Olguin's interview was a standard question and answer session that covers nine pages of transcript. It began at 2:18 a.m., approximately three to four hours after the shooting. Ms. Olguin's answers are mostly responsive and short, frequently monosyllabic. She told the officers that she was standing on the opposite side of the street when she saw an African-American and two Hispanic men arguing. One of the Hispanics shot the African-American, after which they both ran away. Ms. Olguin was familiar with the victim, whom she knew as "Marcus." She had never seen the Hispanic men before.

After reviewing a tape recording of Ms. Olguin's interview, the trial court refused to admit it under the hearsay exception for a spontaneous statement. The court based its ruling on "[n]umerous factors beyond time, question and answer, her whole attitude, her tone, even beyond the description of her as a heroin addict who appears to be under its influence. She certainly sounds mellowed out. On that ground, I will not allow it in."

Evidence Code section 1240 is a codification of the well-established common law exception to the hearsay rule for "excited utterances." (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) It allows admission of hearsay evidence that "(a) [p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) Such evidence must satisfy three requirements: " '(1) there must be some occurrence startling enough to produce . . . nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' " (*People v. Washington* (1969) 71 Cal.2d 1170, 1176, quoting Wigmore, Evidence (2d ed.) § 1750.)

The theory underlying the spontaneous statement exception to the hearsay rule is that statements made under the immediate influence of a startling event are reliable because " 'in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief.' " (*Showalter v. Western Pacific R. R. Co.* (1940) 16 Cal.2d 460, 468.) Two of the most important considerations in determining whether a particular statement qualifies under Evidence Code section 1240 are the amount of time that has elapsed since the occurrence and whether the statement was truly spontaneous rather than provided in response to questioning, but neither of these factors is determinative. (*People v. Brown* (2003) 31 Cal.4th 518, 541; *People v. Poggi, supra,* 45 Cal.3d at p. 319.) Even extended lapses of time do not disqualify a statement if there is evidence that the

statement was nonetheless provided under " 'the stress of nervous excitement' " (see *People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234–1235 [two-day lapse of time did not disqualify where evidence of extreme excitement]), and statements provided in response to questioning that are similarly accompanied by indicia of stress may also qualify. (*People v. Poggi*, at pp. 318–319.) "The crucial element [is] the mental state of the speaker. The nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant. . . ." (*People v. Farmer* (1989) 47 Cal.3d 888, 903–904, overruled on other grounds in *People v. Wailda* (2000) 22 Cal.4th 690, 724, fn. 6.) We review the ruling of the trial court on a motion for admission under section 1240 for abuse of discretion. (*People v. Pirwani* (2004) 119 Cal.App.4th 770, 787.)

The trial court concluded that there were several factors weighing against a finding of spontaneity, including the elapsed time between the killing and the questioning, the question and answer framework of Ms. Olguin's statements, her attitude toward the questioning, and the tone of her voice and comments, which "sound[ed] mellowed out." There is no basis for finding that the trial judge abused his discretion in reaching this conclusion. The questioning occurred three to four hours after the incident, sufficient time for any initial excitement to fade. There was no element of urgency or spontaneity apparent in Ms. Olguin's responses to the police questions, and there is no other evidence that her "mental state" was the least bit excited during the questioning. On the contrary, the trial court found her tone to be "mellowed out."[1] Other than the objective fact that Ms. Olguin had witnessed a brutal murder several hours before, there is no reason to believe that she was at all excited by the time the police began to interview her.

Defendant contends that it "may be safely assumed" that Ms. Olguin "was still 'under the stress of excitement' " when she made the statement because of the intensity

[1] We were provided a copy of transcript of the interview but not a copy of the tape, and accordingly accept the word of the trial court on this issue.

of the experience of witnessing a murder. In fact, Ms. Olguin's excitement cannot be "assumed" but must be affirmatively proven. Unlike many spontaneous statement declarants,[2] Ms. Olguin was not personally involved in the crime but was merely a witness. While a witness can certainly become excited enough to issue a spontaneous statement, that excitement cannot be presumed but must be proven from evidence bearing on the "mental state of the speaker." (*People v. Farmer, supra,* 47 Cal.3d at pp. 903–904.) An example is *People v. Caudillo* (2004) 122 Cal.App.4th 1417, in which a witness phoned the police while the perpetrators were still in her sight, was too afraid to give the police her phone number, and was "clearly excited and stressed." (*Id.* at p. 1432.) There is no similar circumstantial or direct evidence suggesting that Ms. Olguin was still under the stress of the incident when she was interviewed. On the contrary, she had three to four hours to calm down and deliberate, she was in unthreatening circumstances, and her tone of voice and manner were "mellowed out."

Defendant notes that "any delay in obtaining the statement was caused by the officer's decision to record her statement at the police station." In fact, the reason for the delay is entirely irrelevant; the only issue is whether the excitement persisted.

Defendant also claims that "[i]t is apparent from the record" that the reason for the trial court's ruling was the judge's perception that Ms. Olguin appeared to the investigating officer to be under the influence of heroin and argues that ingestion of narcotics cannot "automatically render her statement inadmissible." In fact, the trial judge's remarks make clear that his decision was based on the totality of the circumstances, including but far from exclusively the apparent effects of narcotics. It is simply not true that he ruled Ms. Olguin's statement "automatically . . . inadmissible" as a result of her drug use.

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[2] E.g., *People v. Brown, supra*, 31 Cal.4th 518 [coparticipant in crime]; *People v. Arias* (1996) 13 Cal.4th 92 [crime victim]; *People v. Poggi, supra*, 45 Cal.3d 306 [crime victim]; *People v. Washington, supra*, 71 Cal.2d 1170 [crime victim]; *People v. Garcia* (1986) 178 Cal.App.3d 814 [crime victim]; *People v. Jones* (1984) 155 Cal.App.3d 653 [crime victim].

Defendant further argues that there is no evidence that Ms. Olguin's statement was contrived, which defendant characterizes as "the *sine qua non* for exclusion of such statements," citing *People v. Trimble, supra,* 5 Cal.App.4th at pp. 1234–1235. To the extent defendant is arguing that evidence of invention is necessary before a statement can be found not subject to the spontaneous statement exception, defendant is simply wrong. Neither *Trimble* nor any other court has ruled that evidence of invention is necessary before the statement of an unavailable witness can be ruled inadmissible. Rather, such statements are presumptively inadmissible unless the proponent can demonstrate that a particular statement satisfies the requirements for the hearsay exception, as outlined above. If the "*opportunity* for deliberation" exists—that is, if the declarant "had the chance to return to a calmer mental state"—those requirements are less likely to be met, regardless of whether there is evidence that actual deliberation, let alone invention, occurred. (*People v. Pirwani*, *supra*, 119 Cal.App.4th at p. 790 [abuse of discretion to admit evidence when victim made statement two days after alleged assault].) As noted above, defendant has failed to present any objective evidence that Ms. Olguin was still under the sway of the evening's events when she was interviewed by the police. There was no abuse of discretion in the trial court's exclusion of Ms. Olguin's interview.

Because this evidence was hearsay and not admissible under any recognized exception to the hearsay rule, the trial court's exclusion did not prevent defendant from exercising his constitutional right to present a complete defense. (See *United States v. Scheffer* (1998) 523 U.S. 303, 308 [statutes excluding evidence "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve' "]; *Zarvela v. Artuz* (2d Cir. 2004) 364 F.3d 415, 418 [exclusion of hearsay statement did not deprive defendant of right to present a complete defense where defendant failed to show that the statement qualified for a hearsay exception].)

B. Uncharged Crimes Evidence and Admission of Expert Testimony

Defendant also contends that the trial court erred by admitting evidence of certain uncharged drug-related offenses and related expert testimony.

The considerations governing the admission of evidence of uncharged criminal acts by a defendant were summarized by the Supreme Court in *People v. Thompson* (1980) 27 Cal.3d 303 (*Thompson*), overruled on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260: "The admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact. This court has repeatedly warned that the admissibility of this type of evidence must be 'scrutinized with great care.' . . . [¶] . . . As with other types of circumstantial evidence, its admissibility depends upon three principal factors: (1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence. [Citations.]" (*Thompson,* at pp. 314–315, fns. omitted; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 378–379.)

The primary "rule or policy" requiring exclusion of evidence of uncharged criminal acts is Evidence Code section 1101, subdivision (a), which requires the exclusion of evidence of prior crimes (or other conduct) "when offered to prove [the defendant's] conduct on a specified occasion." The theory behind section 1101, which has deep roots in the Anglo-American legal system, is that evidence that a defendant has committed crimes other than those currently charged cannot be admitted solely for the purpose of proving that the defendant is a person with a propensity for criminal conduct. (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Ortiz* (2003) 109 Cal.App.4th 104, 111 (*Ortiz*).) Such evidence is barred because it risks " 'provoking' . . . 'an overstrong tendency to believe defendant guilty' based on the commission of the *prior* acts rather than those charged in the pending prosecution. In short, the evidence is barred to prevent conviction based upon the defendant's 'bad character.' " (*Ortiz,* at p. 111, quoting 1A Wigmore on Evidence (Tillers rev. 1983) § 194, at p. 1859.)

The Evidence Code, however, recognizes that evidence of uncharged criminal acts can be relevant for reasons other than to prove bad character. Accordingly, subdivision (b) of section 1101 authorizes the admission of evidence of criminal acts otherwise excludable under subdivision (a) if the acts are "relevant to prove some fact . . .

other than [the defendant's] disposition to commit [a criminal] act." Evidence is most commonly admitted under subdivision (b) to prove (1) the defendant's intent, (2) a common design or plan between the uncharged and charged crimes, or (3) that it was the defendant who committed the charged crime, based on his or her commission of a very similar uncharged crime. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402–403 (*Ewoldt*).)[3] In order to be admissible under section 1101 for these purposes, the uncharged criminal acts must bear some resemblance to the charged crime, with the requisite degree of similarity varying depending upon the purpose for which the evidence is admitted. (*Ibid.*) A trial court's decision to admit evidence of uncharged crimes is reviewable for abuse of discretion. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.)

The trial court permitted the prosecution to present testimony by two police officers that on at least two occasions they had observed defendant engage in drug sales in Oakland near the scene of the shooting. In addition, defendant stipulated to the fact that on two other occasions he was arrested for selling cocaine and that he was arrested on a probation violation for being under the influence of marijuana. Finally, the prosecution was permitted to elicit expert testimony from a police officer that the area where the murder occurred was a common scene of drug-dealing, that location is an important factor in successful drug trade, and that violence can result when disputes over serving customers or over territory occur among drug dealers. The prosecution contended that this evidence was relevant to prove its theory that the murder was motivated by a dispute between defendant and the victim over the victim's competing sale of drugs in defendant's territory.

We apply the three-part analysis of *Thompson,* requiring an analysis of materiality, tendency to prove, and exclusionary policy. As to materiality, the evidence of defendant's drug-dealing activities was offered to prove that he was, in fact, a drug dealer

[3] Although the rule of *Ewoldt* has been superceded by statute in certain sex-related crimes (see *People v. Britt* (2002) 104 Cal.App.4th 500, 505), those statutory changes are not relevant here.

who operated in the area where the shooting occurred. This was an essential factual element of the prosecution's theory of motive, offered to explain a shooting that had no obvious provocation. Although motive is not an element of the crime of murder, it was an important factor in evaluating the credibility of the eyewitness testimony in this case because it provided an explanation for behavior by the killer that was otherwise not explained by the testimony of the prosecution's witnesses. The evidence was therefore material. Because this motive testimony, in which the uncharged crimes evidence played a role, provided a plausible explanation for defendant's conduct, it also had a reasonable tendency to prove the charges.

Defendant contends that the prosecution failed to provide an adequate "foundation" for admission of this evidence to prove motive because the prosecution's theory of motive was based on speculation, given substance only by expert testimony about drug turf wars, rather than by any evidence from the crime itself. Although defendant speaks in terms of evidentiary "foundation," we interpret this to be an argument that the prosecution did not introduce sufficient evidence of a dispute over drug-dealing to make the prior acts evidence and expert testimony relevant. However, the testimony of Perez and Vargas that the killing occurred during an argument between two drug dealers over who would have the privilege of selling cocaine to Perez provided an adequate factual basis for the relevance of this evidence, which was offered to explain the significance of such a dispute.[4]

The final element in the *Thompson* analysis is the existence of a rule or policy barring admission. Because the cocaine sales arrests were not part of the events leading up to the murder, but instead constituted evidence of prior acts admitted to prove conduct on the night of the murder, the evidence was subject to Evidence Code section 1101. Under *Ewoldt,* the admissibility of uncharged crimes evidence ordinarily depends upon the similarity of the uncharged crimes to charged crime, with the degree of similarity

[4] The testimony of Buchanan regarding relations between defendant and Cauley, while not part of the prosecution's case, subsequently confirmed the prosecution's theory.

required depending upon the reason for which the uncharged crimes evidence is sought to be admitted. (*Ewoldt, supra,* 7 Cal.4th at p. 402.) However, when similarity of the charged and uncharged crimes is not "necessary to bridge the gap between other crimes evidence and the material fact sought to be proved," similarity need not be demonstrated. (*Thompson, supra*, 27 Cal.3d at p. 319, fn. 23.) This is the case when the fact of the commission of the uncharged crimes is what makes them relevant, as is often the case with motive evidence. (*Thompson*, at p. 319; *People v. Daniels* (1991) 52 Cal.3d 815, 856–857 [dissimilar uncharged crimes evidence admissible where events during the commission of the uncharged crime provided a motive for the charged crime]; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018 [dissimilar uncharged crimes evidence admissible where "the motive for the charged crime arises simply from the commission of the prior offense"].) In such cases, it is necessary to demonstrate "a nexus between the prior crime and the current one, but such linkage is not dependent upon comparison and weighing of the similar and dissimilar characteristics of the past and present crimes." (*People v. Scheer*, at p. 1018.) Such a nexus existed here, since defendant's drug-dealing activities in the area provided a motive for defendant to respond to the aggressive sales tactics of the victim. The requirements of section 1101 for admission of the evidence were satisfied.

Satisfying these requirements, however, does not end the inquiry. " 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have *substantial* probative value.' [Citation.] [¶] . . . We thus proceed to examine whether the probative value of the evidence of defendant's uncharged offenses is 'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (Evid. Code, § 352.)" (*Ewoldt, supra,* 7 Cal.4th at p. 404; see *People v. Kipp, supra*, 18 Cal.4th at p. 371.) Pursuant to *Ewoldt* and *Kipp*, the probative value of the evidence must be weighed against its potential for undue prejudice, determined by (1) its inflammatory nature relative to the charged offenses, (2) the risk of issue confusion,

(3) its remoteness, and (4) the consumption of time. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 283–285.)

The probative value of this evidence sufficiently outweighed its potential for prejudice. As noted above, the evidence supplied an explanation for the shooting. Set against this, the potential for prejudice was slim because, as tested by the *Branch* factors, (1) the inflammatory nature of cocaine sales, even repeated sales, is not great when measured against the charged crime of murder, (2) given the seriousness of the accused crime and its clear distinction from sale of cocaine, there was little risk of confusion, and (3) the relatively recent vintage of the cocaine sales insured that they had continued relevance. Although the presentation of this evidence did consume more than a modest portion of the trial, this factor alone does not outweigh the significant probative value of the evidence. There was no abuse of discretion in the trial court's decision to admit this evidence.

The reasoning outlined above, however, does not support the introduction of evidence of defendant's parole violation for consumption of marijuana. Defendant's marijuana consumption was not related to his motive for the crime, and we are pointed to no other way in which it was relevant to the murder with which defendant was charged. The admission of this evidence fails both the materiality and "tendency to prove" prongs of the *Thompson* test.

Further, although we conclude that the uncharged cocaine-related charges were properly admissible, they were admissible only for the purpose of proving motive. To prove anything further, such as intent, common design or identity, uncharged crimes must bear some resemblance to the charged crime. (*Ewoldt, supra,* 7 Cal.4th at pp. 402–403.) Other than that it is illegal, the sale of cocaine bears no resemblance to murder. While the trial judge properly instructed the jury that the uncharged crimes evidence could be considered only for limited purposes, he apparently instructed the jury that the limited purposes included both motive and "[t]he identity of the person who committed the

crime."[5] Because use of uncharged crimes for the purpose of proving "identity"—that is, that a crime known to be committed by someone was indeed committed by the defendant before the court—requires the "greatest degree of similarity" between the charge and uncharged crimes (*Ewoldt,* at pp. 394, fn. 2, 403), it was error to instruct the jury that it could consider the uncharged crimes for the purpose of proving identity.

Finally, we must consider the propriety of the trial court's admission of expert testimony by an Oakland police officer regarding the drug trade in Oakland. Defendant contends that the officer's testimony, which mentioned that murders were common in this area of Oakland in the late 1980's and early 1990's and that a well-known drug "family" operated in the area, was prejudicial because there was no testimony linking these particular acts to defendant. As noted above, there was a sufficient foundation in the circumstances of the crime to justify the admission of evidence describing the drug trade in this area of Oakland. While it is true that there was no evidence linking defendant to the drug "family" mentioned or to murders earlier in the decade, the officer's testimony did not purport to imply any such link. Rather, these incidents were mentioned in passing as illustration of the competitive and sometimes violent nature of the East Oakland drug trade, of which defendant was admittedly a part. We find no error in the admission of this testimony. In addition, there was also nothing so inflammatory about the testimony that its admission could have been prejudicial to defendant. (*People v. Felix* (1993) 14 Cal.App.4th 997, 1007–1008.)

C. Prejudicial Effect of the Errors Identified

As indicated above, we find that the trial court erred only in admitting evidence of defendant's probation violation and in instructing the jury that it could consider the uncharged crimes evidence as proof of identity. Reversal as a result of these errors is justified only if it is reasonably probable that a result more favorable to defendant would

[5] We have not been provided with a transcript of the court's jury instructions. We assume that the court instructed the jury in accordance with the written proposed instructions contained in the clerk's transcript.

have been reached absent the errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Cole* (2004) 33 Cal.4th 1158, 1199.)

Both errors were harmless. While evidence that defendant had violated his probation by smoking marijuana should have been excluded, in all likelihood it had little or no bearing on the jury's decision. There was no suggestion that defendant had smoked marijuana prior to the shooting or that his earlier consumption in any other way played a role in the shooting. The jurors' knowledge that defendant smoked marijuana is unlikely to have prejudiced them against defendant or caused them to conclude that he was a person of bad character likely to commit murder. The evidence was simply inconsequential.

The court's instruction that the jury could consider the other crimes as evidence of identity was similarly harmless. Traditional "identity" testimony seeks to tie a defendant to a crime by demonstrating that the defendant was known to have committed a similar crime in the past. (*Ewoldt, supra,* 7 Cal.4th at pp. 393–394.) Here, three witnesses unqualifiedly identified defendant as the shooter, all of whom were quite familiar with defendant from past acquaintance. Buchanan had worked with defendant for years, and the cousins had purchased cocaine from him so many times that they had difficulty estimating. Because there was little possibility of a misidentification, there was no need for traditional "identity" testimony. Despite the court's instruction, the evidence was neither offered nor argued for that purpose. The instruction could not have affected the verdict.[6]

In any event, the evidence of guilt was strong. Two third party witnesses gave virtually identical accounts of the killing, with no uncertainty in their identification of defendant as the shooter or the circumstances of the shooting. These accounts were

[6] While defendant argues that the "identity" of the shooter was an issue at trial, this is simply another way of saying that the trial was held to determine whether defendant in fact committed the crime. The identity of the shooter the witnesses claimed to have seen was never in serious question. The issue before the jury was whether the three witnesses' testimony was contrived for other reasons.

confirmed by Buchanan. While defendant testified in his own defense, he was unable to give any explanation for his whereabouts on the night of the killing and, besides a flat denial, provided not a single exculpatory fact. The only issue at trial was therefore whether the eyewitness testimony was credible. Given the minor nature of the errors indicated, which were unrelated to the credibility of the eyewitness testimony, there is no possibility that, in the absence of these errors, the jury would have reached a different result.

III. DISPOSITION

The judgment of the trial court is affirmed.

_____
Margulies, J.

We concur:

_____
Marchiano, P.J.

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Swager, J.